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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD (PARTIAL)* OF THE 482nd MEETING

Held at Headquarters, New York,
on Wednesday, 13 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL-ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

* No summary record was prepared for the rest of the meeting.

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The meeting was called to order at 3.20 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367; A/CN.9/XXV/CRP.2/Add.2)

Article 12

1. The CHAIRMAN recalled that at the previous meeting, the representative of Egypt had proposed, as a compromise solution, that the words "under a duty" should be changed to "requested" and that the last sentence should be deleted. He appealed to members of the Commission to adopt that proposal in a spirit of compromise.

2. Article 12, as amended, was adopted

Article 14

3. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that the Drafting Group had added the words "other than as a result of the deduction of its charges" to article 14, since the original text seemed to imply that a bank which deducted charges would still be obligated to issue a payment order for correction of underpayment.

4. Article 14 was adopted.

Article 15

5. Article 15 was adopted.

Article 16

6. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that paragraphs (1) and (2) had been redrafted on the basis of the proposal made by the representatives of the United Kingdom and Finland, which the Commission had accepted. In addition, the Drafting Group had deleted the phrase "other than the beneficiary's bank" following the words "a receiving bank" in paragraph (1) because of the possibility the the text might be misread; the meaning was clear from the context. The words "fails to comply" had been changed to "does not comply" because the word "fails" could imply that a subjective criterion was involved. The reference to article 17 (1) had been deleted, the word "failure" had been changed to "non-compliance" and the original third sentence had been deleted.

7. In paragraph (2), the words "of the transfer" had been deleted, since they were thought to be redundant. There had been some doubt in the Drafting Group as to whether the Commission had approved paragraph (2 ter); consequently that paragraph had been included, without changes, in square brackets.

(Mr. Bergsten)

8. In paragraph (3), the reference to article 7 (3), and the phrase "other than the beneficiary's bank" had been deleted. Finally, a new sentence had been added at the end of paragraph (7).

9. Ms. BURRE-HÄGGUND (Observer for Finland) said that, under the basic liability scheme set out in paragraphs (1) and (2), interest deriving from a delay in the completion of a credit transfer should go to the beneficiary. Paragraph (2 ter) provided a subsidiary rule for situations in which the beneficiary did not automatically receive the interest to which he was entitled. In such a situation, the beneficiary could try to determine which bank in the chain had caused the delay or failed to pass on interest, or could claim interest from the originator on the basis of the rules governing the underlying contract. If the beneficiary decided to follow the latter course, the originator needed to recover the interest to which the beneficiary would have been entitled. The purpose of the paragraph then, was to ensure that the interest loss was not borne by the originator, when the delay was caused by one of the banks in the transfer chain.

10. Mr. BHALA (United States of America) said that he opposed the inclusion of paragraph (2 ter) in article 16 because it put the burden of recovering lost interest on the originator; who would have to look upstream in the credit-transfer chain to determine which bank had caused the delay. That was an unwarranted interference in the originator-beneficiary relationship, which many delegations seemed to feel was a matter best left to local law. There would only be a small number of cases in which the originator decided to pay interest to the beneficiary instead of referring to article 16 (1).

11. The paragraph also posed a problem of moral hazard by encouraging banks to delay a credit transfer in the hope that the originator would pay interest to the beneficiary. While paragraph (1) put pressure on banks to keep the credit transfer moving quickly, paragraph (2 ter) weakened that pressure. Paragraph (2 ter) might have other undesirable effects: on the basis of the underlying contract, the originator might claim, not just interest, but also fees or penalties from banks in the chain.

12. Mr. GREGORY (United Kingdom) said that most members of the Drafting Group had believed that the Commission had already approved paragraph (2 ter). It was indicated in paragraph 6 of the Commission's draft report to the General Assembly (A/CN.9/XXV/CRP.1/Add.1) that after discussion, the Commission adopted the substance of the proposed paragraphs (1) and (2 ter) and had referred them to the Drafting Group.

13. Paragraph (2 ter) was needed because the beneficiary would always find it easier to recover interest from the originator, if the contract gave that right, than to invoke article 16 (1). The objective of the paragraph was to relieve the originator of liability and make it clear that liability lay with the bank that had caused the delay. The paragraph did not interfere with the originator-beneficiary relationship since it did not indicate whether the

(Mr. Gregory, United Kingdom)

beneficiary had the right to claim interest from the originator, but dealt only with the situation in which the beneficiary exercised that right, and related strictly to the bank that had caused the delay.

14. The problem of moral hazard was more likely to arise if paragraph (2 ter) was omitted. If the beneficiary exercised his rights under the underlying contract, the originator might have rights of subrogation under ordinary law, and the situation would be much less clear. Instead of paying interest to the beneficiary and the originator, a bank might withhold the interest and allow the beneficiary to sue the originator, because rights of subrogation were difficult to enforce. A clear rule was needed requiring a bank to give up interest to the beneficiary, or to the originator if the beneficiary first applied to the originator. As to the question of excessive claims, paragraph (2 ter) clearly referred only to the interest the beneficiary would have been entitled to.

15. Mr. DE BOER (Observer for the Netherlands) said that he also supported the inclusion of paragraph (2 ter). If it was not included, problems might arise in respect of subrogation, which was not always an automatic right. There could also be difficulties in countries having systems of statutory interest, which was generally higher than bank interest.

16. Mr. GRIFFITH (Observer for Australia) said that the provision was useful, particularly as there was no clear right of subrogation in civil-law countries.

17. Mr. CHATURVEDI (India) and Mr. SCHNEIDER (Germany) said that they also supported the inclusion of paragraph (2 ter).

18. The CHAIRMAN urged the United States delegation to accept paragraph (2 ter), on the understanding that its view would be fully reflected in the Commission's report to the General Assembly.

19. Article 16 was adopted.

Article 16 bis

20. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that article 16 bis comprised former paragraph (8) of article 16. Its topic, the exclusivity of remedies, had been judged important enough to warrant a separate article. The first sentence of the former paragraph (8) had been eliminated, as the Drafting Group, after considerable discussion, had concluded it no longer served any purpose, the relevant rights and obligation being set out in the Model Law.

21. The words "in respect of non-compliance with articles 7 or 9" had been inserted after the words "shall be available" in the new article simply in order to make the scope of the remedies provided explicit. Otherwise, only minor drafting changes had been made.

22. Mr. BURMAN (United States of America) proposed a further drafting change that had already been discussed by the members of the Drafting Group: instead of "articles 7 or 9", the article might read "the obligations dealt with in article 16".

23. Mr. SCHNEIDER (Germany) said that the wording suggested did not have quite the same meaning as the wording it would replace - article 16 dealt with other articles than just 7 and 9.

24. Mr. DUCHEK (Austria) said that he found the proposed drafting technically deficient, since it did not specify the nature of the obligations referred to, which were essentially to pay interest under certain circumstances.

25. Mr. CHATURVEDI (India) noted that India had opposed the concept of exclusivity of remedies as contrary to the common-law system of judicial review of remedies. His delegation therefore did not favour the creation of a separate article 16 bis. Those considerations apart, the change proposed by the representative of the United States was acceptable.

26. Mr. LIM (Singapore) said that he opposed the United States proposal reluctantly. Like the representative of Austria, he found the drafting deficient in that it did not make clear what obligations were referred to.

27. Moreover, article 16 (6) referred to the liability of the beneficiary's bank towards the beneficiary, which was also an obligation dealt with in article 16. Therefore, the proposed wording represented a substantive change.

28. The CHAIRMAN suggested that the representative of the United States should withdraw his proposal.

29. Mr. BURMAN (United States of America) withdrew his proposal, which his delegation had put forward to facilitate statutory drafting in systems such as its own. The intent had not been to alter the substance of the article.

30. Article 16 bis was adopted.

Article 17

31. Mr. BERGSTEN (Consultant to the Secretariat), speaking as Chairman of the Drafting Group, said that former paragraph (2) of article 17 had been deleted and placed in a footnote to article 17, in accordance with the Commission's wishes. Accordingly, the title of the article had been changed to "Completion of credit transfer", eliminating the reference to discharge of obligation. In paragraph (3) the words "shall be considered complete" had been replaced by "is completed".

32. Mr. ALVAREZ (Uruguay) noted that the introductory formula for the footnote to chapter I was the same as that for the footnote to article 17 except that it included the word "additional" between the words "following"

(Mr. Alvarez, Uruguay)

and "text". He proposed its removal so that the two introductions would be identical.

33. The CHAIRMAN said he would take it that the Commission agreed to the proposal of the representative of Uruguay.

34. Mr. SCHNEIDER (Germany) said that the report should duly reflect the strong opposition among members of the Commission to the provisions that had been placed in footnotes.

35. Article 17 was adopted.

36. The CHAIRMAN invited the Commission to adopt the draft Model Law on International Credit Transfers as a whole.

37. The Model Law, as a whole, was adopted.

38. Mr. CHATURVEDI (India) said he wished to put on record that the documents prepared by the secretariat, although issued too late to stimulate broad discussion, had raised some very good points and should receive further consideration.

The discussion covered in the summary record ended at 4.40 p.m.